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No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURRILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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The United States petitioned this Court for review in this case to resolve a conflict among the circuits on an issue of great practical importance: whether any failure to observe the Bail Reform Act's "first appearance" provision requires the pretrial release of a person who would otherwise be subject to pretrial detention. Respondent expends considerable energy explicating the procedural violation that supposedly occurred in this case. We submit that respondent's interpretation of the record is incorrect. In the end, however, that dispute is beside the point. The important issue is the consequence of the supposed violation. Respondent offers no sound justification for his position that any violation of the "first appearance" and continuance provisions, no matter how minor, entitles a defendant to pretrial release on conditions that have been judicially

determined to be insufficient to prevent his flight and continued criminality.

1. Respondent criticizes our characterization of the events leading to the district court's release order in this case, so it may be useful to review the events briefly.

Wednesday, February 8, 1989: Customs agents stopped respondent near Orogrande, New Mexico, and found him in possession of 72 pounds of cocaine. After being given *Miranda* warnings, respondent agreed to cooperate with Customs and DEA agents by making a "controlled delivery" of the drugs to persons he said were awaiting their delivery in Chicago. The agents flew to Chicago with respondent later that day. Pet. App. 4a-5a; Tr. 7-8 (Feb. 23, 1989).[1]

[1] Respondent is critical of the government for not taking him before a magistrate in New Mexico on February 8, 1989, for an initial appearance. See Resp. Br. 1-2, 2[illegible]. As the prosecutor explained to the district court, however, shortly after respondent was apprehended, he agreed to participate in a "controlled delivery" of the cocaine in Chicago. Respondent then voluntarily accompanied the agents to Chicago in an attempt to apprehend the other participants in the smuggling venture. His arrest was therefore postponed until after the controlled delivery. When the controlled delivery failed, the government on February 10, 1989, filed a complaint, obtained an arrest warrant, and promptly took respondent before a federal magistrate in Chicago for an initial appearance and transfer hearing under Rule 40, Fed. R. Crim. P. Even if respondent were deemed to be under arrest during the period of the controlled delivery for purposes of Rule 5, Fed. R. Crim. P., it was not improper to postpone respondent's initial appearance until February 10. To hold an initial appearance before the controlled delivery would have increased the risk that respondent's accomplices would learn of his arrest, which would defeat any prospect of a successful controlled delivery in Chicago. See Tr. 8, 13, 17 (Feb. 23, 1989). Rule 5 provides that an arrestee must be taken before a magistrate for an initial appearance "without unnecessary delay." Because of respondent's agreement to cooperate with the agents and the need to avoid compromising his status as a cooperating witness, the delay in taking him before a magistrate was "necessary" and therefore did not result in a violation of Rule 5.

Friday, February 10, 1989: The controlled delivery in Chicago failed. While respondent and the agents were still in Chicago, the government filed a criminal complaint in New Mexico charging respondent with possession of cocaine and obtained a warrant for his arrest on that complaint. Respondent was then promptly brought before a United States magistrate in Chicago for a transfer hearing. See Fed. R. Crim. P. 40. The prosecutor who was handling the hearing stated at that time that she had intended to move for detention but that instead she had reached an agreement with respondent's appointed lawyer under which respondent would consent to be returned to New Mexico and would waive his right to both a detention hearing and a preliminary hearing in Chicago. Respondent was returned to New Mexico that evening. Pet. App. 5a-6a; J.A. 16-19.[2]

Monday, February 13, 1989: On Monday morning, the government asked the United States magistrate in Las Cruces to schedule a detention hearing for respondent. The magistrate's office scheduled the hearing for the next

[2] Respondent contends (Br. 2, 9, 13 ~~10-11, 16~~) that the government moved for detention on February 10 in Illinois and that the detention hearing should have been conducted there or promptly upon his return to New Mexico. As the district court and the court of appeals found, however, while the government clearly signaled at the February 10 hearing that it would be seeking detention, it did not formally seek detention at that time. The government sought detention the following week when, on February 13, it requested that a detention hearing be set. See Pet. App. 11a, 20a, 29a n.5. Although the court of appeals treated what transpired at the February 10 hearing as the equivalent of a motion for detention, in doing so the court recognized that no specific motion had been made. *Id.* at 11a. Respondent notes (Br. 10) that the New Mexico prosecutor told the district court that he believed a detention motion had been made in Chicago, but that was before the prosecutor, who did not handle the Chicago hearing, had had an opportunity to see the transcript of that hearing. See Tr. 22 (Feb. 23, 1989).

available date, February 16. Pet. App. 6a-7a; Tr. 21 (Feb. 23, 1989).[3]

Thursday, February 16, 1989: The magistrate held a brief hearing. He noted that the government would be filing a written detention motion shortly. Because the pretrial services office had not completed its report on respondent, the magistrate continued the detention hearing for two working days, until February 21, 1989 (Monday, February 20, 1989, was a holiday). Respondent did not object to the continuance, although respondent's counsel expressed the view at that time that the government should have moved for detention in Chicago, at the time of his transfer hearing. Pet. App. 7a; J.A. 21-23.[4]

Friday, February 17, 1989: The government filed its written motion, requesting that respondent be detained. Pet. App. 8a.

Tuesday, February 21, 1989: The magistrate held a detention hearing, at the conclusion of which the magistrate ordered the defendant released on conditions. Pet. App. 8a.

Thursday, February 23, 1989: The district court held a hearing on the government's appeal from the magistrate's release order. The court found that respondent was detain-

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[3] The magistrate in Las Cruces was a part-time magistrate and was unavailable between Monday, February 13, and Thursday, February 16. See J.A. 43.

[4] Respondent asserts (Br. [illegible] n.4) that we are wrong in identifying the February 16 hearing as the one at which the government first sought detention. The government, however, specifically requested the February 16 hearing for the purpose of seeking a detention order. Although the "first appearance" requirement is normally triggered by a formal motion for detention, in the circumstances of this case the request for a detention hearing was a sufficiently clear indication of the government's intentions that the February 16 hearing may be regarded as respondent's "first appearance before a judicial officer" following the government's request for detention.

able under the standards set forth in 18 U.S.C. 3142(e) but that he had to be released because the detention proceedings had not complied with the time limits in the "first appearance" provision of the Bail Reform Act, 18 U.S.C. 3142(f). Pet. App. 22a-24a, 30a-31a.

This chronology shows not a callous disregard for the defendant's rights, as respondent suggests, but an effort on the part of the government and the court to proceed expeditiously under unusual circumstances. The government brought respondent before a judicial officer on the day of his arrest in Chicago, where he waived his right to an immediate detention hearing. Respondent was returned to New Mexico pursuant to court order that night, and on the morning of the next working day the government requested that the New Mexico magistrate schedule a detention hearing on the next available court day; the magistrate then ordered a continuance of the detention hearing for two working days, without objection by respondent to the continuance. The hearing before the magistrate and the appeal to the district court were then completed within two days.

This chronology, and the debate between the parties about the proper characterization of various events and motions, demonstrates how difficult it can be to interpret and apply the time requirements of Section 3142(f). If respondent validly waived his right to an immediate detention hearing in Chicago, or if respondent's "first appearance before the judicial officer" for purposes of the Act did not occur until February 16 in New Mexico, the Act may not have been violated at all (since the detention hearing was held only two working days later, on February 21). Although the district court and the court of appeals ruled against the government on both of those points, there is at least a substantial argument, based on case law in

other circuits, that under the circumstances of this case there was no violation of the time limits of Section 3142(f) at all.[5]

We make these observations for two reasons. First, while we have not asked this Court to review the court of appeals' conclusion that the "first appearance" requirement was violated, we submit that a fair reading of the record shows, at a minimum, that the violation was not flagrant. Second, the debate in this case about the proper characterization of various proceedings is exactly the kind of dispute that courts have been struggling with and will

[5] Respondent's waiver of his right to an immediate detention hearing in Chicago would have been sufficient in either the Second or Fourth Circuits. See *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987); *United States* v. *Clark*, 865 F.2d 1433, 1436-1437 (4th Cir. 1989) (en banc). Moreover, in the Second, Seventh, and Eighth Circuits, the transfer hearing in Chicago would not have been regarded as respondent's "first appearance before the judicial officer," either because it did not occur after a motion for detention, see *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc), or because a transfer hearing is not regarded as a "first appearance" for purpose of Section 3142(f), see *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986); *United States* v. *Dominguez*, 783 F.2d 702, 704-705 (7th Cir. 1986). The continuance granted, without objection, from February 16 to February 21 was acquiesced in by the government and respondent (although respondent preserved an objection to the government's failure to move for detention in Chicago, J.A. 23). Respondent's failure to object to the continuance should have been regarded as an acquiescence in a three- or five-day continuance. See *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) ("Unless a defendant objects to the proposed hearing date on the stated ground that the assigned date exceeds the three-day maximum, he is deemed to acquiesce in up to a five-day continuance."); *United States* v. *Malekzadeh*, 789 F.2d 850, 851 (11th Cir. 1986). And even if the three-day continuance period is applicable, rather than the five-day continuance period (see 18 U.S.C. 3142(f)), the continuance granted on February 16 was for only two days if weekends and holidays are excluded, as the Second Circuit has held they should be. See *United States* v. *Melendez-Carrion*, 790 F.2d at 991.

continue to struggle with, if a technical violation of the Section 3142(f) time limitations requires automatic release on conditions.[6] The time-consuming, and ultimately unproductive, debates among the courts of appeals over what constitutes a "first appearance," whether the right to a detention hearing can be waived, when a judicial officer may grant a continuance *sua sponte*, and how weekends and holidays should be counted, see Pet. 9-10, are an unfortunate by-product of a rule in which a timing error automatically defeats the government's right to detain the defendant, no matter how minor the error or how clear the case for detention may be. And, because detention proceedings are invariably conducted during the often-chaotic period immediately following a defendant's arrest, it is likely that minor errors in the application of the time limits of Section 3142(f) will continue to be made in a significant number of cases, despite the best efforts of agents, prosecutors, and magistrates.

2. Respondent's legal argument is based on language from 18 U.S.C. 3142(e), which states that detention can be ordered only "after a hearing pursuant to the provisions of subsection (f) of this section." Respondent argues that if there is any deviation from the time limits set forth in

[6] Respondent is critical of our use of the term "automatic release," since a defendant who is not detained may nonetheless be subjected to a variety of release conditions. We use the term "automatic release" not to suggest that the defendant's release is unconditional, but because it accurately describes the judicial officer's obligation under the statute when detention is not available. If the judicial officer does not order detention, but decides instead to impose a financial condition, he may not impose a condition that the defendant cannot meet. 18 U.S.C. 3142(c)(2). Thus, if the defendant is not detained, bail must be set at a level that guarantees that the defendant will be able to obtain his release.

Section 3142(f), the hearing has not been conducted "pursuant to the provisions of subsection (f)," and detention therefore may not be ordered.

Respondent's argument proves too much. If a deviation from the time limitations in Section 3142(f) renders the detention hearing not "a hearing pursuant to the provisions of subsection (f)," the same would logically be true of other deviations from the hearing procedures set forth in Section 3142(f). Thus, the court's failure to permit the defendant to testify, or its failure to permit him to cross-examine a witness at the hearing, would not be subject to harmless error analysis and, in fact, would not even permit the court to hold a new, error-free detention hearing.[7]

Understandably, respondent backs away from the implications of his position with respect to procedural defects other than timeliness, suggesting that other errors may be subject to harmless error analysis. See Br. 2[illegible]. But petitioner does not adequately explain how that concession is consistent with his "plain meaning" interpretation of Section 3142(e). If a failure to follow "the provisions of subsection (f)" with respect to timeliness means that a condition precedent for detention has not been satisfied, it is hard to understand why a failure to comply with other provisions of Section 3142(f) would not have the same effect. It is not enough to say, as respondent does (Br. 23-24), that a hearing that violates some of the procedural requirements of Section 3142(f) may still be "fair," but that a hearing that is not held "immediately upon the person's first appearance before the judicial officer" cannot be "prompt." Just as a minor procedural deviation may

[7] Under respondent's theory, of course, a new hearing could not be held in that situation, because it would be barred by the time limitations of Section 3142(f).

not render a hearing materially less fair, a minor delay in holding the hearing does not render it significantly less prompt.

Many statutes and rules dictate the procedures that are to be followed in particular proceedings – often in mandatory terms. But while the failure to comply with those procedural requirements may be error, that does not necessarily mean that the proceeding in question is void or that the party seeking to vindicate a right through that proceeding must permanently be denied relief. For example, Rule 6(d), Fed. R. Crim. P., states that, with certain exceptions, no person other than "the witness under examination" may be present while a grand jury is in session. Even though that rule is stated in mandatory terms, the Court has held that it is subject to harmless error analysis. *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369, 2378 (1988). Similarly, Rule 43(a) states in mandatory terms that, except in specified circumstances, the defendant "shall be present * * * at every stage of the trial." Nonetheless, this Court has held that violations of Rule 43 are subject to the harmless error rule. *Rogers* v. *United States*, 422 U.S. 35 (1975). Finally, Rule 32(a), Fed. R. Crim. P., requires that sentence be imposed without "unreasonable delay." Nonetheless, even if a defendant shows that the delay in sentencing was unreasonable, he is not entitled to relief for unreasonable delay unless he can show that the delay prejudiced him. *United States* v. *Campbell*, 531 F.2d 1333 (5th Cir. 1976), cert. denied, 434 U.S. 851 (1977); *United States* v. *James*, 459 F.2d 443 (5th Cir. 1972).

3. Respondent argues that harmless error principles are not applicable to this case for several reasons, but those reasons do not withstand analysis. Contrary to respondent's assertion (Br. 2[illegible]), Rule 52(a), Fed. R. Crim. P., applies to trial level proceedings and is not simply a standard for

appellate review. See *Bank of Nova Scotia*, 108 S. Ct. at 2374 (district court may not disregard Rule 52(a) and dismiss indictment because of misconduct before the grand jury if the misconduct did not prejudice the defendant). If the error in this case was not one that "affect[ed] substantial rights," the district court should have disregarded it. The implication of respondent's interpretation of Rule 52(a), as applied to other kinds of errors, is that a district court would be required routinely to grant a new trial upon discovering any error at all in the proceedings, but that the reviewing court, applying harmless error principles, would be required to reverse the new trial order whenever it found the error to be harmless. Criminal litigation has never functioned that way and, we hope, never will.

Respondent seeks to distinguish the harmless error cases cited at page 16, note 7, of our opening brief on the ground that "those cases deal with the post-conviction review of a constitutional violation of the defendant's rights" (Br. 28 n.10), rather than a statutory violation, as in this case. It is simply not the case, however, that constitutional errors are subject to harmless error analysis and statutory errors are not. See *United States* v. *Lane*, 474 U.S. 438, 446 n.9 (1986). Indeed, this Court's cases suggest that harmless error principles apply more broadly to claims of statutory error than to claims of constitutional error. See *Chapman* v. *California*, 386 U.S. 18 (1967) (constitutional errors are subject to stringent "beyond a reasonable doubt" test for harmless error); *Bank of Nova Scotia*, 108 S. Ct. at 2374-2375 (nonconstitutional errors are harmless unless the court concludes, from the record as a whole, that the error may have had a "substantial influence" on the outcome of the proceeding).

Respondent contends that to apply a harmless error analysis to violations of the "first appearance" provision of

Section 3142(f) would render that provision a dead letter. That argument assumes that prosecutors and magistrates would willfully ignore statutory mandates. We doubt that magistrates and prosecutors will behave in that fashion. Even assuming bad faith on the part of court officers, the district courts and courts of appeals have within their power sanctions that can have a much more direct effect on magistrates and prosecutors who willfully disregard the statutory requirements. Disciplinary actions against officials who ignore the statutory time limitations are likely to have a far greater impact, especially on magistrates, than legal rules that simply require that detention be denied if the magistrate does not hold a timely detention hearing.

The costs imposed by a rule requiring automatic release for any violation of Section 3142(f)'s time limits, we submit, far outweigh the costs imposed by a harmless error rule. A rule of automatic release will mean that defendants who have been judicially determined to be dangerous or to be flight risks will have to be released; it can confidently be predicted that many of them, like respondent in this case, will flee or commit other crimes. In addition, a rule of automatic release will give defendants, especially defendants who are very likely to be detained, no incentive to avoid a violation of the time limitations. In this case, there likely would have been no violation at all if respondent had refused to waive his right to a detention hearing in Chicago, or if he had insisted on a detention hearing earlier than February 16, or if he had opposed the continuance of the hearing until February 21. But respondent voiced no objection at any of those points, and, if the court of appeals' judgment is affirmed, his silence will be rewarded. The per se rule that respondent advocates thus provides a huge incentive to "sandbagging" by defendants whose only hope of release is that the magistrate or the prosecutor will

make a technical timing error in the proceedings leading to the detention order.

4. Respondent suggests (Br. [illegible]) that "Rule 4(a) of the Federal Rules of Appellate Procedure provides a useful analogy," and asserts that the Bail Reform Act's provisions governing the timing of a hearing should be treated, like Rule 4's time limits, as mandatory and jurisdictional. The comparison is inapt. This Court has long recognized that the time limits imposed by this rule (and predecessor statutes) must be strictly observed to assure the finality of judgments. *E.g.*, *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). The Court has stated:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the applicant's demands. Any other construction of the statute would defeat its purpose."

Ibid., quoting *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). The Bail Reform Act's provisions governing the timing of a detention hearing serve an entirely different purpose. As respondent recognizes (Br. [illegible]), they are intended to protect the arrestee's and the government's interest in obtaining a prompt, but reasoned, determination of the defendant's eligibility for pretrial release. A rule that requires automatic release of the defendant for any violation of the time limits would subvert, rather than advance, that goal.

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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